



Mwangi, Shama & Muita (Suing as the Chairman, Vice-Chairman and Committee Member of the Runda Association) v Zaward Limited & another (Environment & Land Case 1625 of 2016) [2022] KEELC 15145 (KLR) (24 November 2022) (Judgment)

Neutral citation: [2022] KEELC 15145 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1625 OF 2016
OA ANGOTE, J
NOVEMBER 24, 2022**

BETWEEN

**PETER MWANGI, SANJEEV SHARMA & SAMUEL MUITA PLAINTIFF
SUING AS THE CHAIRMAN, VICE-CHAIRMAN AND COMMITTEE
MEMBER OF THE RUNDA ASSOCIATION**

AND

**ZAWARD LIMITED 1ST DEFENDANT
COUNTY GOVERNMENT OF NAIROBI CITY COUNTY 2ND DEFENDANT**

JUDGMENT

1. The Plaintiff, through the Plaintiff dated December 23, 2016, has sought the following orders:
 - a. A declaration that the Second Defendant acted in breach of its constitutional obligations by failing to seek the Plaintiff's members participation before granting the First Defendant access to Runda Estate through LR 7785.
 - b. A declaration that the purported conversion of the cul-de-sac road on LR 7785 into a through road is illegal.
 - c. A declaration that the First Defendant's property LR No 14274/23 is not entitled to access Runda Estate through LR 7785.
 - d. A permanent injunction restraining the First Defendant, whether by its servants and/or agents or otherwise, from interfering with the construction of the wall between LR 7785 and LR 14274.
 - e. General damages.



- f. Any other further orders that the court may deem necessary to make.
 - g. Costs of this suit and interest thereon at court rates with effect from the date of filing suit.
2. It is the Plaintiff's case that its members have individual titles under sub-divisions of LR 7785 and Nairobi/ Block 112 (Runda Estate), while the 1st Defendant was the developer of plot No LR 14274/23 located next to Runda Estate. They urged that both plots have separate cul-de-sac roads, which are non-through roads restricted to accessing the properties for which it is planned as a dead-end road.
3. They pled that a decade ago, the Plaintiff constructed a wall between the subject plots on Pan African Insurance Lane in Runda Estate, in recognition of the cul-de-sac limitation and the Plaintiff's mandate to ensure security.
4. It was averred by the Plaintiff that the 1st Defendant sought access for its planned development, Azure Villas, on L.R. 7785 through Pan African Insurance Lane, to which the Plaintiff objected because due process had not been followed; that the 1st Defendant had its own access road to its property directly from Kiambu Road and that despite the Plaintiff's objections, the 2nd Defendant granted the 1st Defendant approval to access Runda estate and demolished the security wall.
5. The Plaintiff contended that the 2nd Defendant's approval was unlawful as it violated article 10(2) of the Constitution which requires public participation in enacting, applying or interpreting any law or in implementing any public policy decision and that the 2nd Defendant acted without guidance on the environmental consequences of building a road and connecting it to an existing road, with the Plaintiff's members apprehensive of possible flooding.
6. According to the Plaintiff, the 2nd Defendant acted beyond its mandate in granting approvals for a development in Kiambu County and that the 2nd Defendant violated the Plaintiff's members' right to security of person under article 29 of the Constitution in authorizing the removal of a wall between the two plots, exposing them to security risks.
7. According to the Plaintiff, the opening up of the impugned wall threatens the Plaintiff's members' right to a clean and healthy environment under article 42 of the Constitution by authorizing termination of a new surface drainage system where flooding is a perennial problem and that the Defendant's actions is a violation of the Urban and Cities Act No 13 of 2011 which requires active participation by residents in the management of urban areas and city affairs.
8. The Plaintiff lastly averred that the 1st Defendant is not entitled to the access road because its property is a subdivision of LR 14724, which was subdivided in 1993 into 11 plots, LR 14274/1-11, all with an access to Kiambu Road; that in processing the subdivision, Survey of Kenya inadvertently indicated the locality as Nairobi rather than Kiambu Municipality and that in 2005, LR 14274/10 was further subdivided into eleven plots, one of which belongs to the Defendant, and is indicated as being in Nairobi.
9. The Plaintiff urged that LR No 14274/23 does not share a border with Runda Estate and is 230 meters within Kiambu County and that the approval conditions the 2nd Defendant gave while approving the subdivision of LR 14274 was that the road serving the development is a cul-de-sac.
10. It is the Plaintiff's case that on the night of December 10, 2016 at 3:00am, unidentified men with crude weapons broke down the wall; that the demolition of the wall was instigated by the 1st Defendant as it had previously sought to have the wall demolished and that the Plaintiff's attempts to rebuild the wall



have since been thwarted and the 2nd Defendant commenced building the road to create a new access point through the disputed point.

11. In the 1st Defendant's Statement of Defence, it was averred that the Plaintiff has no authority or power under any law to carry out functions of ensuring security and protection of its resident members and their property; that the construction of a wall on a public road so as to restrict members of the public from using it is illegal and that there was already an existing public access to the development through Pan African Insurance Lane, which the Plaintiff illegally blocked.
12. It is the 1st Defendant's case that the 2nd Defendant and the Kenya Urban Roads Authority advised the Plaintiff that access to the 1st Defendant's development was through Pan African Insurance Lane, which was a public road and that any encroachment on it was not permitted.
13. The 1st Defendant urged that it lawfully obtained all the requisite approvals from the 2nd Defendant as well as from the National Environment Management Authority. It denied that the Survey of Kenya made the alleged errors and that no corrections reflecting the changes to the survey plan as the Plaintiff has alleged have been made.
14. In its Statement of Defence, the 1st Defendant averred that it has conducted itself in accordance with the law; that the letter to the Plaintiff dated November 3, 2015 was not communicating any decision but informing the Plaintiff of the factual and legal position on the subject and that the subject access road is legal and does not breach any law, neither does it lead to flooding.

The Plaintiff's Evidence

15. PW1, Peter Muhiu Mwangi, adopted his written statement dated December 23, 2016, in which he reiterated the Plaintiff's case. In cross examination, PW1 denied that the Plaintiff's association received the letter dated August 3, 2015 from the 2nd Defendant. He averred that the Plaintiff has attached five survey plans which indicate that there is an error on their face.
16. It was the evidence of PW1 that the survey plan FR No 236/197 shows LR No 14274/6-11 but does not cover LR 14274/23. That survey plan FR No 300/140 refers to LR 14274/12-13 while FR No. 542/90 is for 14274/40, and shows the adjoining property is 14274/23. Folio 580/107 is with respect to LR No 14274/ 42-49 while FR 333/21 is for LR No 14274/14-24. The latter captures the suit property and shows a wide road of fifteen meters.
17. In re-examination, PW1 testified that the wall was demolished without any notice to the Plaintiff and was an act of thuggery. PW1 stated that the wall had been there for more than a decade and that the Plaintiff's members have suffered flooding on the impugned road every year.

The Defendant's Evidence

18. The 1st Defendant presented two witnesses. The first witness, DW1, stated that the 1st Defendant developed 8 residential villas on its property and obtained all the requisite approvals and that the development was however frustrated by the Plaintiff who blocked access to the suit property by erecting a wall on the road.
19. It was the evidence of DW1 that they sought for clarification from the 2nd Defendant, who through its letter dated July 28, 2015, confirmed that the area is part of a road reserve and should be free from encroachments.
20. According to DW1, the 1st Defendant thereafter requested the Plaintiff to demolish the wall blocking the road of access by way of a letter dated August 3, 2015 and attached the relevant approvals for



its development and that the 1st Defendant's architects also offered to fit a gate and provide manned security to address the Plaintiff's security concerns.

21. It is the 1st Defendant's case that the Plaintiff persisted in its refusal to demolish the wall; that the 2nd Defendant responded to the Plaintiff's claims vide a letter dated November 3, 2015 and clarified that the title and survey plan show that the suit property is situate in Nairobi and not Kiambu County; that the plans for the development were submitted to NEMA and the 2nd Defendant with all the relevant approvals being given and that there was in existence an access road from Pan African Insurance Lane, which access had been unlawfully blocked by the Plaintiff.
22. It was the testimony of DW1 that there was no requirement for the 2nd Defendant to seek the Plaintiff's participation in the opening up of the access road because the subject matter is a public road and not part of Runda Estate. According to DW1, he inherited LR 14274/23 from his father, and the land was registered in his favor in 2005. DW1 stated that he found the access road in existence although he could not tell how it was created.
23. DW2, a land surveyor, stated that the subdivision of LR 14274 created access to Kiambu Road; that re-planning was done in 2005 vide Survey Plan FR No. 333/21 which allowed access to the land both Kiambu Road and LR 7785 as shown on survey plan FR No. 222/69 and that when the two plans are superimposed, the roads fit in each other perfectly as they are equal in width.
24. DW1 averred that FR No. 333/21 which was authenticated by the Director of Surveys in 2005 is superior to FR No. 236/97 and 300/140 which were done in 1993 and 1996 respectively and that the re-planning that was carried out and approved by Nairobi County and the Survey Department cleared the way for access on both Kiambu road and through the scheme of LR No. 7785.
25. It was the evidence of DW1 that once a scheme is registered in a particular locality, the subsequent subplots resulting as subdivisions will be maintained in the same locality and registration district and that the recent approval made by the Survey of Kenya on LR No. 14274/63, originally LR No. 14274/23, before change of user, reveals its locality and registration District as Nairobi vide survey plan FR 614/87. DW2 stated that the road in question on Deed Plan no. 175108 was surrendered free of charge to the government as required by law.
26. DW2 stated that the road on LR 236/197 does not have a cul-de-sac; further, that where a road serves more than five people, it becomes a public road, which can only be closed for security reasons and that the impugned road is public and the issue of approval by the county does not arise. According to DW2, FR No. 333/21 was a sub-division of Plots 10 and 11 which led to the alignment of the two roads.

Submissions

27. The Plaintiff's advocate submitted that the 1st Defendant unlawfully purported to create an illegal access road from its development into Runda Estate, without the participation of the Plaintiff or its members and that the Defendants disregarded the existing cul-de-sac and constructed a road between its development and Pan African Insurance Lane in Runda Estate.
28. According to the Plaintiff's advocate, the 2nd Defendant did not call any witness or produce any evidence; that its case against the 2nd Defendant was uncontroverted and that the failure by the Defendant to call witnesses to give evidence in support of a filed Defence renders the Plaintiff's case unchallenged.
29. It was the Plaintiff's advocate's case that the 1st Defendant's property culminated in a cul-de-sac on the Runda side and that the creation of the access road was therefore illegal. He urged that the wall that existed before December 10, 2016 had been there for at least 10 years; that the wall prevented access



- through Runda for all properties on the Kiambu side of the wall and that the properties on the upper side of the wall were served by a different access road as shown in the survey map.
30. The Plaintiff's counsel submitted that the maps show that the two roads, joined by the access road in question, did not join but end at dead ends; that the 1st Defendant flouted the approved subdivision which contained the condition that the proposed cul-de-sac serving the development to be construed to adoptive standards and that it is irrelevant that the later survey plans show that the property now has access to Pan African Lane.
 31. It was the Plaintiff's advocate's submission that the access road was created illegally because the Defendant did not have a development permission nor an EIA license to build a paved road in contravention of section 30 of the *Physical Planning Act*, section 58 of the *Environmental Management and Co-ordination Act* and regulation 4(1)(b) of the *Environmental (Impact Assessment and Audit) Regulations, 2003*.
 32. It was submitted that contrary to the obligation to engage in public participation before giving any development approval, the Defendants failed to conduct public participation before creating the access road, which has a profound impact on the rights, property and legitimate expectations of the Plaintiff's members.
 33. This obligation, it was submitted, is set out in articles 10(1)(c), 10(2)(a) and 174(c) of the *Constitution of Kenya 2010*, Sections 2 and 21 (g) of the *Urban and Cities Act* No 13 of 2011 and Section 41(3) of the *Physical Planning Act*. Counsel relied on the case of *Patrick Simiyu Khaemba v KETRACO* ELC Case No 166 of 2013 and *Ken Kasing'a v Daniel Kiplagat Kirui*, Petition 50 of 2013.
 34. It was submitted that the 2nd Defendant violated the Plaintiff's members' right to fair administrative action by demolishing the subject wall without giving the Plaintiff's members an opportunity to be heard. They relied on *Multiple Hauliers East Africa Limited v Attorney General & 10 others* Petition No 88 of 2010 where the court held that demolishing a perimeter wall without giving notice amounted to violation of the Petitioner's right to be heard.
 35. The 1st Defendant's advocate argued that this case is not about the creation of an access road to LR No 14274/23 as this raises the impression that a road was non-existent and that Survey Plan FR 236/97 which the Plaintiff relies on shows that it was supplanted by FR 333/21, which shows that there is only one wide road from a T-junction at the top and which plan was authenticated in 2005.
 36. The 1st Defendant submitted that the road has been described as a public road, a road reserve and an estate road under management of the 2nd Defendant, which the Plaintiff has not rebutted. Counsel relied on the case of *Homescope Properties Limited & Another v Karen Ngong View Estate & another*, ELC 793 of 2013 where the court considered the difference between a public road and an access road.
 37. It was the 1st Defendant's advocate submissions that the construction of the wall on the public road was unlawful; that the issue of public participation ought not to arise as the Plaintiff is invoking that right to enforce an illegality and that no evidence of flooding or insecurity has been offered resulting from the demolition of the wall.
 38. The 2nd Defendant' advocate submitted that the 2nd Defendant's actions were legally justified as they were discharging their duty under the *Urban Areas and Cities Act* and the *Physical Planning Act* procedurally and in accordance with the law.
 39. They urged that DW1 demonstrated that the 1st Defendant obtained development permission from 2nd Defendant as per section 30 (1) of the *Physical Planning Act* (repealed) and approval from relevant agencies including NEMA and that the disputed access road is provided for within the integrated urban



and city development plan and gazetted as a road reserve accessible to the public. It was submitted that the acts of the Plaintiff are thus illegal and unlawful.

Analysis and Determination

40. I have considered the pleadings, submissions and the oral and documentary evidence by the parties. The issues that arise for determination are:
- a. Whether the purported conversion of the cul-de-sac road on LR 7785 into a through road is illegal
 - b. Whether the wall built by the Plaintiff was lawful
 - c. Whether the 2nd Defendant unlawfully demolished the Plaintiff's wall.
41. The facts as pleaded by the Plaintiff are that both plots, the 1st Defendant's property LR No 14274/23 and the Plaintiff's members land LR No 7785 and Nairobi/ Block 112 (Runda Estate), have separate cul-de-sac roads, which are non-through roads restricted to accessing the properties for which they were planned for as dead-end roads. It is the Plaintiff's case that a decade ago, it constructed a wall on Pan African Insurance Lane in Runda Estate.
42. The Plaintiff has averred that the 1st Defendant sought access for its planned development, Azure Villas on LR 7785 through Pan African Insurance Lane and that despite objections from the Plaintiff, the 2nd Defendant unlawfully allowed the creation of an access road joining Pan African Insurance Lane. The Plaintiff has urged that this violated the Plaintiff members' rights to public participation and security, as well as the risk of flooding.
43. The Defendants' case is that there was already a legally recognized public access to the 1st Defendant's development through Pan African Insurance Lane, which the Plaintiff illegally blocked. The 1st Defendant denied that its development is in Kiambu County and averred that the subject access road is legal and does not breach any law and denied that the road may lead to flooding.
44. A public road is defined under section 2 of the [Public Roads and Roads of Access Act](#) as:
- “(a) any road which the public had a right to use immediately before the commencement of this Act;
 - (b) all proclaimed or reserved roads and thoroughfares being or existing on any land sold or leased or otherwise held under the East Africa Land Regulations, 1897, the Crown Lands Act, 1902, or the Government Lands Act (Cap. 280), at any time before the commencement of this Act;
 - (c) all roads and thoroughfares hereafter reserved for public use.”
45. While a road of access is not expressly defined in [Public Roads and Roads of Access Act](#), section 9 (1) of the Act describes the process by which such a road is created:
- “Where any owner or occupier of land is in respect of his land so situated in relation to a public road which is passable to vehicular traffic, or to a railway station or halt, that he has not reasonable access to the same, he may make application to the board of the district in which such land is situate for leave to construct a road or roads (hereinafter called a road of access) over any lands lying between his land and such public road or railway station or halt,



and every such application shall be made in duplicate in the form and contain the particulars required by the First Schedule to this Act:

Provided that, if the applicant is unable to make the sketch plan mentioned in the said Schedule without entering upon the lands over which he proposes that the road of access is to pass, he may apply to the board for leave to enter upon the said lands for the purpose of making the said sketch plan and the board may then make an order entitling the applicant to enter on the said lands.”

46. The Court of Appeal in *Dellian Langata Limited v Symon Thuo Mubia, Mary Njoki Thuo, Agricultural Finance Corporation, Nairobi City Council & Council of Legal Education* [2018] eKLR considered the distinction between a public road and a road of access as follows:

“Having regard to the above provisions we are persuaded that there is a distinction between a public road and a road of access. A public road is set apart and designated as such and once set aside is available for use by all members of the public without limitation or restriction save as may be determined by the relevant authorities. On the other hand road of access has connotation of private usage and is characterized by a party having made an application to have an access road constructed to connect or link such party to utilities such as a public road, railway station or a halt. As correctly observed by the respondents the provisions do not apply where there is already a public road or road of access as in the instant case.”

47. Accordingly, for a road to be considered a road of access, a party needs to have made an application to have such road constructed to link them to a public road.
48. The Plaintiff’s have contended that both properties at issue were served by dead-end cul-de-sac roads. The definition of a cul-de-sac road is not provided in any Act of Parliament. The *Physical Planning Handbook*, 2002, however offers clarity on the nature of this road.
49. The *Handbook* provides guidelines for the preparation and implementation of physical development plans, and indicates that cul-de-sac or dead-end streets are a type of access road, which give direct access to buildings and land within neighborhoods or localities, and are meant to eliminate through traffic in a cluster of houses. The Handbook thus prescribes that for these roads to retain their inherent advantage ‘they should be short, normally up to a maximum of 60 metres.”
50. Based on these definitions, a road of access and a cul-de-sac are similar in that there is a connotation of private use, as they serve to provide access to particular land and they are dead-end roads. However, the purpose for their creation differs: a road of access is created, upon application of the owner of a landlocked property, to link their land to a public road while a cul-de-sac is created to limit traffic into a cluster of homes.
51. The duty to undertake public participation is enshrined under article 10 of the *Constitution of Kenya*, which prescribes that it is a national value binding on state organs and state officers and article 69(d), which prescribes that the state should encourage public participation in the management, protection and conservation of the environment.
52. Indeed, as set out in schedule 2 of the *Urban Areas and Cities Act* No 13 of 2011, residents of a city or urban area have the right to be informed of decisions of a board or town committee, affecting their rights, property and reasonable expectations. Further, Section 21(g) of the Urban Areas and Cities Act provides that subject to the *Constitution* and any other written law, the board of a city or municipality shall, within its area of jurisdiction ensure participation of the residents in decision making, its activities



and programmes in accordance with the Schedule to the Act as provided in the [County Governments Act, 2012](#) and any other national legislation on public participation.

53. Section 41 (3) of the [Physical Planning Act](#) (now repealed) also prescribed the process of public participation as follows:

“where in the opinion of a Local Authority an application in respect of development, change of user or subdivision has important impact on contiguous land or does not conform to any conditions registered against the title of the property, the Local Authority shall at the expense of the applicant publish the notice of the application in the gazette or in such other manner it deems expedient and shall serve copies of the application on every owner or occupier of the property adjacent to the land.

41 (4) of the local authority receives objection to or representation in connection with an application made under 41 (1) it shall notify the applicant of such objections and shall before the application is determined afford the applicant opportunity to respond.”

54. The Plaintiff’s case is that the 2nd Defendant created an access road following the request by the 1st Defendant, without due public participation and without guidance on the environmental consequences of building a road and connecting it to an existing road.

55. This court must first consider the nature of the roads that served both the Plaintiff members’ properties and the 1st Defendant’s land. While the Plaintiff has insisted that they were both served by cul-de-sac roads, which are private and have a dead-end, they have failed to present evidence of an application for their creation. In addition, DW1 testified that once a road is created to serve more than five people, it becomes a public road, which can only be closed for security reasons.

56. The court in [Moses Wamuti Kinuthia v John Njau Kimani](#) [2020] eKLR considered the nature of private road, roads of access and roads created as a result of re-survey, subdivision and reparation:

“From the materials presented in this suit, the road created as a result of the resurvey, subdivision and reparation of the two parcels of land, respectively owned by the parties to this suit, was not and is not a road of access as contemplated under Section 9 of the Act. I say so because its creation did not take the elaborate statutory procedure for creation of a road of access. Its creation took the route of mutual resurvey, sub-division, reparation, and transfer, within the then existing legal framework on land planning, land survey, land registration, and roads. It was consequently created as a public road to serve the three parcels created out of the mutual resurvey, sub-division, and reparation...”

If the parties to this suit intended to create a “private road” for the plaintiff as contended by the plaintiff, the route to take would have been to parcel out the portion which now exists as a public road and give it a separate title in the name of the plaintiff or amalgamate it as part of the plaintiff’s land. Were that to happen, the land registrar would have to satisfy himself that every new parcel contemplated in the new layout is served by a public road before accepting the layout. This did not happen. What therefore exists is a public road created to serve the three new parcels created through the mutual resurvey, sub-division and reparation. It is also a public road created to serve the general public seeking access to the three parcels.”

57. In this matter, neither party has disputed that the two roads were creatures of survey plans FR No 236/97 and 300/140 which were done in 1993 and 1996. These plans were later amended in 2005 vide Survey Plan FR No 333/21, which allowed access through the scheme of LR No 7785. It is this resurvey/replanning that transformed the dead-end road leading into the Plaintiff’s land into a through



road that served other parcels of land, and not the purported development approval granted by the 2nd Defendant in 2017.

58. The Plaintiff has not challenged the validity of the 2005 resurvey nor did it tender evidence to show that there was no public participation in this process, which would require the participation of proprietors impacted by such subdivision. DW2 testified that the 2005 re-planning was carried out and approved by the then Nairobi City Council. The survey department cleared the way for access on the road in dispute.
59. The Plaintiff's evidence has not challenged the process which connected the two roads. Indeed, the roads have been joined in the year 2005, the Plaintiff cannot use the 2010 Constitution, or the Urban Areas and Cities Act, 2011 to challenge the joining of the two roads.
60. In any event, it has not been shown that the resurvey process which culminated in 2005 was conducted without the inclusion of the Plaintiff's members. On the other hand, the validity of Survey Plan number 333/21 that opened up the two cul de sac roads was authenticated by the Director of Survey as required under section 32 of the Survey Act. This section provides as follows:
- “No land shall be deemed to have been surveyed or resurveyed until the plan thereof has been authenticated by the signature of the Director or of a Government surveyor authorized in writing by the Director in that behalf, or by the affixing of the seal of the Survey of Kenya in accordance with section 5.”
61. On the issue of whether the purported conversion of the cul-de-sac road on LR 7785 into a through road is illegal, this court holds that the Plaintiff failed to discharge its legal burden of proof.
62. I shall now consider the issue of construction of the wall by the Plaintiff. This court has already found that the contested road was a public road and was for the public's use. Therefore, the act of building a wall was an encroachment on public land as was asserted by the 2nd Defendant through their letter dated July 28, 2015, and was unlawful.
63. Indeed, resident associations in various parts of the City have evolved as necessary partners to fill in the void left by the County Governments or security agents, but as the court held in George Munge v Sanjeer Pancho Sharma & 3 others [2012] eKLR, resident associations, such as the Plaintiff herein, should not infringe upon private property rights or the right of the public to access or use public or city roads.
64. For those reasons, I dismiss the Plaintiff's suit. However, considering that the Plaintiff filed this suit in the interests of its members, I decline to award costs. Each party will bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 24TH DAY OF NOVEMBER, 2022

OA ANGOTE

JUDGE

In the presence of;

Mr Mwangi for 1st defendant.

Mr Kahora for plaintiff.

Court Assistant - June

